90-233

Supreme Court, U.S.
FILED
AUG 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DONALD EUGENE RYANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

C. KEVIN MORRISON
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
1120 Twentieth Street, N.W.
Suite 750 South Building
Washington, D.C. 20036
(202) 822-9100

KINDANNE C. JONES
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
First Oklahoma Tower, Suite 800
210 West Park Avenue
Oklahoma City, Oklahoma 73102
(405) 232-2828

WILLIAM J. SKEPNEK *
SCOTT J. BLOCH
MARTHA J. AARON
STEVENS, BRAND, LUNGSTRUM, GOLDEN & WINTER
P.O. Box 189
Lawrence, Kansas 66044
(913) 843-0811

August 6, 1990

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether lawyers employed by the United States Department of Justice, Antitrust Division, acted unethically in violation of the applicable Code of Professional Responsibility by causing their agent to contact Petitioner without the knowledge or consent of his attorney, after they had made him the target of criminal prosecution, and after they knew that he had retained counsel to represent him in that prosecution.

2. Whether the improper conduct of Government attorneys in allowing their agent, while posing as a co-defendant, to intrude upon Petitioner's attorney-client communications vitiates any possible waiver of the attorney-client privilege.

PARTIES TO THE PROCEEDINGS

All of the parties to the proceedings below are identified in the caption.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS, REGULATIONS, AND COURT RULES INVOLVED	2
STATEMENT OF THE CASE	3
A. Proceedings Below	3
B. Statement of Facts	5
REASONS FOR GRANTING THE WRIT	9
I. THE CIRCUITS ARE IN CONFLICT ON THE APPLICABILITY OF DR 7-104(A)(1) BEFORE INDICTMENT	9
II. THE COURT OF APPEALS' DECISION SWEEPS TOO FAR IN EXEMPTING GOVERNMENT ATTORNEYS FROM ETHICAL RULES APPLICABLE TO ALL OTHER ATTORNEYS	13
III. MR. RYANS DID NOT WAIVE HIS ATTORNEY-CLIENT PRIVILEGE	19
CONCLUSION	21
APPENDICES	
Opinion of the United States Court of Appeals for the Tenth Circuit	1a
Order Denying Rehearing	22a
Order of the United States District Court for the Western District of Oklahoma	24a
Order Staying Mandate	33a

TABLE OF AUTHORITIES

Cases: United States Supreme Court	Page
Johnson v. Zerbst, 304 U.S. 458 (1938)	19
Kirby v. Illinois, 406 U.S. 682 (1972)	14
Maine v. Moulton, 474 U.S. 159 (1985)	18, 19
Michigan v. Harvey, —— U.S. ——, 110 S. Ct. 1176 (1990)	15
Patterson v. Illinois, 487 U.S. 285 (1988)	17, 18

Cases: United States Court of Appeals	
Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964)	20
Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965)	20
In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989)	20
United States v. Dobbs, 711 F.2d 84 (8th Cir. 1983)	10
United States v. Durham, 475 F.2d 208 (7th Cir. 1973)	5, 10
United States v. Fitterer, 710 F.2d 1328 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983)	10, 13
United States v. Hammad, 858 F.2d 834 (2d Cir. 1988)	4, 5, 10, 11, 17
United States v. Kenny, 645 F.2d 1323 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981)	10, 13
United States v. Killian, 639 F.2d 206 (5th Cir.), *cert. denied*, 451 U.S. 1021 (1981)	5, 10
United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974)	10, 13
United States v. Smith, 379 F.2d 628 (7th Cir.), *cert. denied*, 389 U.S. 993 (1967)	
United States v. Springer, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972)	5
United States v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986)	10, 13
United States v. Thomas, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973)	5, 10
Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18 (9th Cir. 1981)	20

TABLE OF AUTHORITIES—Continued

Cases: United States District Courts	Page
In re FMC Corp., 430 F. Supp. 1108 (S.D. W. Va. 1977)	15
In re Grand Jury Subpoena, 406 F. Supp. 381 (S.D.N.Y. 1975)	20
SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn. 1976)	20
United States v. Chestman, 704 F. Supp. 451 (S.D.N.Y. 1989)	12
United States v. Galanis, 685 F. Supp. 901 (S.D. N.Y. 1988)	12
United States v. Jamil, 546 F. Supp. 646 (E.D.N.Y. 1982), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983)	16, 17
United States v. Scarpelli, 713 F. Supp. 1144 (N.D. Ill. 1989)	12
Constitutional Provisions, Statutes, Regulations, or Rules:	
U.S. Const. amend. VI	15
15 U.S.C. § 1	3
18 U.S.C. § 3731	2, 4
28 C.F.R. § 45.735-1(b)	2, 15
28 U.S.C. § 1254(1)	2
Local Rules of the United States District Court for the Western District of Oklahoma, Rule 4(J)(4)(b)	3, 15
Okla. Stat. tit. 5, chap. 1, app. 3 DR 7-104	2
Okla. Stat. tit. 5, chap. 1, app. 3-A, Rule 4.2	3
Other Authorities:	
ABA Comm. on Prof. Ethics, Formal Opinion 108 (1934)	15
ABA Comm. on Prof. Ethics, Informal Opinions, No. 1149 (1970)	15
ABA Comm. on Prof. Ethics, Informal Opinions, No. 1373 (1976)	15
ABA Comm. on Prof. Ethics, Opinions, No. 95 (1933)	15

TABLE OF AUTHORITIES—Continued

Page

ABA Model Code of Professional Responsibility DR 7-104(A)(1) ..... *passim*
ABA Model Code of Professional Responsibility, DR 7-104(A)(2) 14
ABA Model Rules of Professional Conduct, Rule 4.2 14
D.C. Bar Comm. on Legal Ethics, Opinions, No. 178 (1987) 13
J.M. Clark & C. Wolfram, *Professional Responsibility: Issues for Minnesota Attorneys*, Minn. State Bar Ass'n Cont. Legal Educ. (1976) 15
Rutzick, *Section Takes on Justice Department: Can Government Lawyers Contact Other Lawyers' Clients?*, 15 Litigation News 1 (ABA June, 1990) 12
N.Y.C. Bar Ass'n Comm. on Prof. Ethics, Informal Opinions, No. 79-13 (1979) 15
N.Y. State Bar Ass'n Comm. on Prof. Ethics, Opinions, No. 607 (1990) 15
G. Hazard, Jr. & W. Hodes, *The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct*, Vol. II. (Supp. 1989) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90——

DONALD EUGENE RYANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Donald Eugene Ryans petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit reversing an order of the United States District Court for the Western District of Oklahoma suppressing certain evidence in his prosecution for alleged violation of Section One of the Sherman Act.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 903 F.2d 731, and is reprinted at Appendix pages 1a-21a. The opinion of the District Court granting petitioner's motion to suppress evidence obtained in violation of the ethical rules for attorneys is not reported, but is reprinted at Appendix pages 24a-32a.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on May 8, 1990. A timely suggestion for rehearing *en banc* was denied on July 10, 1990. App. pp. 22a-23a. The Court of Appeals had jurisdiction of this appeal pursuant to 18 U.S.C. § 3731. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS, REGULATIONS, AND COURT RULES INVOLVED

28 C.F.R. § 45.735-1(b) provides in pertinent part:

> (b) . . . Furthermore, attorneys employed by the Department [of Justice] should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association. Interpretations and applications of the Code to an attorney's official duties should be obtained pursuant to § 45.735-2(e).

Prior to its repeal effective July 1, 1988, Okla. Stat. tit. 5, chap. 1, app. 3, DR 7-104 provided:

> Communicating With One of Adverse Interest
>
> (A) During the course of his representation of a client, a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer representing such a party in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
>
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

Okla. Stat. tit. 5, chap. 1, app. 3-A, Rule 4.2 provides:

> Communication With Person Represented by Counsel
>
> In representing a client, a lawyer shall not communicate, or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Rule 4(J)(4)(b) of the Local Rules of the United States District Court for the Western District of Oklahoma provides in pertinent part:

> (b) . . . The Code of Professional Responsibility adopted by the Court is the Code of Professional Responsibility adopted by the highest court of the state in which this court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of Bar Associations within the state.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, Donald Eugene Ryans, was served with a subpoena duces tecum dated April 29, 1986, from a grand jury investigating the practices of the household goods movers in Lawton, Oklahoma which provided services to military personnel stationed at Fort Sill, a United States Army base near Lawton. Nearly three years later, on January 19, 1989, Mr. Ryans was indicted by a grand jury and charged with "engag[ing] in a combination and conspiracy to restrain and suppress competition in the provision of moving services from Fort Sill, Oklahoma," in violation of Section One of the Sherman Act, 15 U.S.C. § 1. App. p. 6a.

On February 21, 1989, Mr. Ryans moved to suppress three tape recordings of telephone conversations between

Mr. Ryans and Kenneth Hughen, an immunized Government informant, on the ground, *inter alia*, that the conversations violated Code of Professional Responsibility DR 7-104(A)(1).[1] The District Court heard testimony relating to the motion from Mr. Ryans, Mr. Hughen, and Federal Bureau of Investigation ("F.B.I.") Special Agent Granville Long about the circumstances surrounding the recordings on March 14 and 16, 1989. On March 23, 1989, the District Court issued its order denying the motion to suppress the first tape, but granting the motion as to the two subsequent tapes. App. pp. 24a-32a. The District Court held that the communications with Mr. Ryans, conducted at the behest of Government attorneys, after they had targeted Mr. Ryans for prosecution, and after they knew that Mr. Ryans had retained counsel to represent him in that prosecution, violated DR 7-104(A)(1). App. pp. 29a-31a. The District Court imposed the sanction of suppression after considering lesser and greater sanctions. App. p. 31a.

The Government filed its notice of appeal pursuant to 18 U.S.C. § 3731 on Friday, March 24, 1989, and on the same day the Court of Appeals stayed the trial in this case, then scheduled to begin the following Monday. On May 8, 1990, the Court of Appeals reversed the District Court holding that "DR 7-104(A)(1)'s proscriptions do not attach during the investigative process before the initiation of criminal proceedings," App. 18a, expressly refusing to follow *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988). App. p. 15a ("We must disagree with the *Hammad* opinion's interpretation of the rule").[2]

---

[1] Effective July 1, 1988, Oklahoma adopted the ABA Model Rules of Professional Conduct to govern attorneys. However, at the time the recordings subject to this appeal were made, the ABA Model Code of Professional Responsibility was in effect.

[2] The Court of Appeals did not consider the question of the appropriate remedy for the Government attorneys' unethical conduct because it did not find that conduct unethical. It is clear, how-

On August 1, 1990, the Court of Appeals stayed its mandate pending decision on this petition. App. p. 33a.

B. Statement of Facts

In 1985, the Antitrust Division of the United States Department of Justice began a nationwide investigation of national household goods transportation carriers and local moving agents in the business of transporting goods for military personnel. App. p. 3a. As part of that investigation, in early 1986 lawyers from the Division's Dallas, Texas office, Carl LoPresti, Alan Pason,[3] and Jane Phillips, contacted F.B.I. Agent Long in Lawton, Oklahoma, and directed him to begin an investigation at Fort Sill. *Id.*

In March or April, 1986, the Government attorneys and F.B.I. Agent Long contacted informant Hughen, and eventually reached an agreement with him under which he received immunity from prosecution in exchange for his assistance in the Government attorneys' investigation and prosecutions. *Id.* To further that assistance, Hughen was provided with F.B.I. audio tape recording equipment, and was instructed to engage his fellow movers in conversations and elicit admissions from them, all of which were to be recorded. *Id.*

---

ever, that suppression is an available and appropriate remedy for the ethical violation involved here. *See, e.g., United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988); *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1021 (1981); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973); *United States v. Springer*, 460 F.2d 1344 (7th Cir. 1973), *cert. denied*, 409 U.S. 873 (1972). Moreover, the choice of appropriate remedy is within the discretion of the District Court subject to reversal only for abuse of discretion. *See United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973). In this case, the District Court considered greater and lesser sanctions, and its imposition of the exclusionary sanction cannot be considered an abuse of discretion.

[3] In the District Court's Order, Mr. Pason's name is misspelled "Payzant."

Over the next three months, Hughen recorded approximately sixty telephone and face-to-face conversations with targets of the Government's prosecution; all persons Hughen already had identified as members of the alleged conspiracy. The conversations were directed by the Government attorneys and Agent Long, and were coordinated with the issuance of grand jury subpoenas to the prosecution targets. In addition, the prosecutors issued a subpoena to Hughen to make it appear to the others that he was also a target, though he had already given his statement and his documentary evidence to the prosecutors. App. p. 34a.[4]

With his sham subpoena in hand, Hughen set about contacting the prosecution targets under the guise of coordinating subpoena responses and a joint defense. Most of the contacts occurred after Agent Long and the Government attorneys knew the targets were represented by counsel regarding the investigation. During many of the interviews, Hughen repeatedly questioned the targets about their conversations with their lawyers, ostensibly to organize the defense effort.[5] Hughen even went so far with one target as to say, "I'm kinda like your attorney," when, in fact, he was the chief accuser and instrument for the Government prosecutors.[6]

---

[4] The Court of Appeals found the subpoena was "not fictitious; it was simply unnecessary." App. p. 13a n.8. Nonetheless, there is no meaningful distinction between the subpoena in this case and the one labeled a "sham" in *Hammad*. The subpoena here was issued, in the F.B.I. agent's words, "to maintain the charade."

[5] The defense prepared and had admitted into evidence a summary of 61 interviews. Mr. Hughen's practice, as consistently revealed by the transcripts, was to volunteer to the target purported advice from Hughen's lawyer. If the target failed to respond in kind by relating to Mr. Hughen the substance of attorney advice, then Hughen would simply ask directly, which he did again and again. The record shows that 302 of 991 pages of transcript of those conversations included inquiry into lawyer advice. App. p. 20a n.12.

[6] Though Agent Long testified that Hughen's systematic inquiry into the targets' legal representation was against his instruc-

As the recordings were made, Hughen delivered them to Agent Long, who in turn, either passed the tapes along to the Government attorneys, or informed them of the substance of the recordings. On several occasions, Agent Long consulted with the Department of Justice attorneys regarding Hughen's repeated questioning of the targets about their attorney-client relationships, but was told, "We would have to do with what we had." App. pp. 5a, 27a-28a.[7]

Three of the approximately sixty recorded conversations were with Mr. Ryans; the first on May 19, 1986, after Mr. Ryans had already been identified as a "target" of the prosecution. In that Hughen-initiated telephone conversation, Hughen stated the purpose of the call was to discuss compliance with the subpoena served on Mr. Ryans (and the sham subpoena issued to Hughen), and to find out "what in the world's happening." Consistently with his already established pattern, Hughen related to Mr. Ryans a phony account of a meeting with his (Hughen's) lawyer, and asked if Mr. Ryans had yet consulted an attorney. Mr. Ryans told Hughen that he had an appointment the next day with "J. Roy," a man both Hughen and Agent Long knew to be J. Roy Cocke, a Lawton attorney. Indeed, at several points in the conversation Mr. Ryans stated his intention to retain Mr. Cocke. Hughen delivered the tape of that conversation to Agent Long on May 22, 1986. App. pp. 3a-4a.

---

tions, the District Court found, and the Court of Appeals accepted, that Agent Long's testimony was not credible, or at least that his instructions were ineffective. App. pp. 5a n.3, 25a-26a.

[7] There is no suggestion that Mr. Pason, Mr. LoPresti, or Ms. Phillips ever advised Agent Long to cease interviewing targets who were known to be represented by counsel. Implicit in Long's telling the antitrust lawyers that attorney-client communications were being invaded, is his statement that those who were being interviewed were represented by counsel. Equally implicit in the advice given to Agent Long is the direction to continue to interview adverse parties who these lawyers knew were represented by counsel.

The second contact with Mr. Ryans was recorded on June 5, 1986, and again was a telephone conversation initiated by Hughen. At the outset of that conversation Mr. Ryans indicated he had retained Mr. Cocke for representation in the prosecution. Hughen, as before, volunteered purported confidences from his attorney, and Mr. Ryans responded in kind. Hughen then closely interrogated Mr. Ryans, not only about the investigation, but also about the substance of his attorney-client communication, once again under the ruse of coordinating joint defense efforts. Hughen delivered the tape of this conversation to Agent Long on June 12, 1986. App. p. 5a.

The final contact was another telephone call from Hughen to Mr. Ryans, this one on June 18, 1986. This conversation occurred at the specific direction of Agent Long on the day after Mr. Ryans had complied with his subpoena by delivering documents to Agent Long. While Mr. Ryans was in the F.B.I. office, Agent Long told him that the Government knew all about the purported "agreements," including the "times," "dates," "places," "people," and what was said. Agent Long also told Mr. Ryans that the Government would do its best to obtain his indictment and conviction. Agent Long told Hughen about his encounter with Mr. Ryans before Hughen placed the June 18 phone call. App. p. 5a.

In the final telephone call, Hughen falsely stated to Mr. Ryans that he too had recently complied with his sham subpoena, and called to find out whether Mr. Ryans had heard the same "script" from Agent Long. True to form, Hughen volunteered purported advice from his attorney, and elicited similar information from Mr. Ryans. In response to Hughen's continued interrogation, Mr. Ryans related his experiences in Agent Long's office, and made what the Government suggests are incriminating statements. Two and one-half years later, the Government obtained an indictment of Mr. Ryans, and stated its intention to seek admission of all three

tape recordings. Finding the last two recordings constituted a violation of DR 7-104(A)(1), the District Court suppressed their use as evidence at trial, and the Court of Appeals reversed. *Id.*[8]

REASONS FOR GRANTING THE WRIT

The question presented here—whether Government attorneys are at all times bound to follow the same ethical standards applied to other lawyers—is one of great importance to prosecutors and defendants alike. The Court of Appeals resolved this question, not by specific rulings based on the facts of this case, but by a sweeping ruling resting on a legal and factual fiction. In doing so, the Court essentially exempts Government attorneys from the rules of ethics. Moreover, the Court of Appeals' decision in this case is in direct and acknowledged conflict with another circuit of the Court of Appeals. This Court should grant a writ of certiorari to resolve this conflict among the circuits and decide this significant question.

I. THE CIRCUITS ARE IN CONFLICT ON THE APPLICABILITY OF DR 7-104(A)(1) BEFORE INDICTMENT

This case squarely presents for this Court's consideration the question of the application of the rules of ethics to Government prosecutors.[9] The question has been considered, at least in part, by seven courts of appeals, though by most with little discussion of the subject. These courts have resolved the issue with varying de-

---

[8] The Court of Appeals did not base its decision on any disagreement over the facts and found that the District Court's Findings of Fact were not clearly erroneous, App. p. 8a, thus presenting only a question of law for this Court.

[9] Every state has adopted DR 7-104(A)(1) or a similar ethics rule. *See* G. Hazard, Jr. & W. Hodes, *The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct*, Vol. II., AZ1-WY8 (Supp. 1989).

grees of conflict, but not until the Tenth Circuit's decision in this case was the conflict so stark and diametrical.

Two courts appear to have held that the ethical prohibition of contact with one who is represented by counsel does not apply to the actions of Government lawyers before the initiation of formal proceedings. *See United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States v. Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983); *United States v. Lemonakis*, 485 F.2d 941, 955-56 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).[10] One circuit has recognized that while the ethical rule may apply to federal prosecutors in pre-indictment, noncustodial settings, it has not yet had an "opportunity to say just when the ethical line might be crossed." *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981).

Three courts have held that the disciplinary rule does apply to Government lawyers during the pre-indictment stage, though the cases involved post-arrest, custodial contacts. *See United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1021 (1981); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973); *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973).

In *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), the first case to have considered the question in any detail since *Lemonakis*, the United States Court of

---

[10] The discussion in some of these cases, *e.g.*, *Sutton*, was limited to two or three sentences, rejecting application with virtually no analysis. The only case to analyze the issue in any detail was *Lemonakis*, and that case can be read to have been limited to its facts and the court's finding that the Government informant was not the "alter ego" of the Government attorneys.

Appeals for the Second Circuit held that DR 7-104(A)(1) applied equally before and after the commencement of formal criminal proceedings. *Id.* at 839. The court thereby limited Government attorneys' ability to contact targets of federal prosecution after they had retained counsel to represent them in that prosecution. In *Hammad*, as in this case, the Government argued that application of DR 7-104(A)(1) should be coextensive with the Sixth Amendment right to counsel, and should not apply prior to indictment. The Second Circuit rightly rejected that argument because the Code of Professional Responsibility

> not only delineates an attorney's duties to the court, but defines his relationship with his client and adverse parties. Hence the Code secures protections not contemplated by the Constitution.

Id. Further, the Second Circuit noted that the timing of an indictment lies largely within the control of the Government attorney who "could manipulate the grand jury proceedings to avoid [DR 7-104(A)(1)'s] encumbrances." *Id.*

The Tenth Circuit expressly rejected *Hammad* in this case, App. p. 15a ("We must disagree with the *Hammad* opinion's interpretation of the rule"), and instead held that DR 7-104(A)(1) does not apply to Government attorneys until the moment at which the Sixth Amendment right to counsel attaches, thereby completely eviscerating the rule. App. p. 18a. As a result, conduct by Government attorneys which is unethical in New York, for example, is perfectly permissible in Oklahoma. More importantly, meaningful protections available to targets of federal prosecutions in New York are unavailable in Oklahoma.

The Courts of Appeals are not the only bodies in conflict on this question. In June, 1989, just a month after oral argument in this case before the Tenth Circuit, the Attorney General of the United States issued a memo-

randum in which he declared that the rules of ethics, particularly DR 7-104(A)(1), do not apply to Department of Justice attorneys. Rutzick, *Section Takes on Justice Department: Can Government Lawyers Contact Other Lawyers' Clients?*, 15 Litigation News 1 (ABA June, 1990). The Attorney General contended that Government attorney contacts with represented targets are "authorized by law," and that state disciplinary rules are preempted by the Supremacy Clause of the United States Constitution. *Id.* The Attorney General thus asserted that the ethical rule interferes with the statutory obligation of Department of Justice attorneys, civil and criminal, to conduct investigations. The obvious import of that suggestion is that people are less likely to speak the truth if they are first allowed to speak to their attorneys. Implicit in that position is that lawyers generally subvert truth by standing between their clients and the accuser. Not surprisingly, the American Bar Association disagreed, and at the February, 1990 meeting of its House of Delegates, it unanimously passed a resolution denouncing the Attorney General's position. *Id.* The Department of Justice policy, however, has not changed. *Id.*

These conflicts among the courts, the Department of Justice, and the bar have created much confusion in the district courts over the proper application of the rules of ethics to Government attorneys. *See, e.g., United States v. Scarpelli*, 713 F. Supp. 1144, 1159-61 (N.D. Ill. 1989); *United States v. Chestman*, 704 F. Supp. 451, 453-54 (S.D.N.Y. 1989); *United States v. Galanis*, 685 F. Supp. 901, 903 (S.D.N.Y. 1988). That confusion can only be exacerbated by the Tenth Circuit's decision in this case. Lawyers, prosecutors, and defense attorneys alike need guidance on this significant question as much as district court judges. The equality required of the criminal justice system is severely compromised by such a conflict, and this Court should grant a writ of certiorari to resolve it.

II. THE COURT OF APPEALS' DECISION SWEEPS TOO FAR IN EXEMPTING GOVERNMENT ATTORNEYS FROM ETHICAL RULES APPLICABLE TO ALL OTHER ATTORNEYS

The Court of Appeals' decision in this case adopts a bright-line rule: DR 7-104(A)(1) simply does not apply to Government prosecutors prior to indictment of their prosecution targets. The Tenth Circuit is alone in adoption of such an extreme rule for none of the cases the court cites goes so far.[11] At most, the cases cited state that ordinarily the DR will not apply to the investigative stage, *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981), or hold that the facts of the case did not demonstrate a violation of the DR, often with little discussion. *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States v. Lemonakis*, 485 F.2d 941, 955-56 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).[12] None of these courts have stated that DR 7-104(A)(1) can never apply pre-indictment.

In its desire to create a bright-line rule for the application of DR 7-104(A)(1) to prosecutors, the Court of Appeals created an artificiality which cannot with-

---

[11] Indeed the Tenth Circuit's rule would appear to apply to civil as well as criminal situations. *See* App. p. 16a ("the rule appears to contemplate an adversarial relationship between litigants, whether in a criminal or civil setting").

[12] If the Tenth Circuit is correct in its conclusion that the District of Columbia Circuit Court held in *Sutton* and *Lemonakis* that the DR applies only after indictment, an intolerable conflict exists even within that circuit. The Legal Ethics Committee of the District of Columbia Bar Association has held that DR 7-104(A)(1) prohibits defense counsel from interviewing represented witnesses before their indictment. D.C. Bar Comm. on Legal Ethics, Opinions, No. 178 (1987). The inequity of that conflict is obvious—prosecutors can contact represented targets before indictment, but defense counsel cannot.

stand scrutiny. Focusing on the language of the rule, the court noted that while DR 7-104(A)(1) prohibits communication with a "party" known to be represented by counsel, DR 7-104(A)(2) prohibits an attorney from giving advice to a "person" not represented by counsel. Although it found no definition of the word "party" in the Code, the Court of Appeals determined that the rule contemplates an adversarial relationship between litigants, whether in a criminal or civil setting. App. pp. 15a-16a. Citing *Kirby v. Illinois*, 406 U.S. 682 (1972), the court then drew the line for application of the ethical rule at the moment charges are filed or an arrest has been made. App. p. 18a.

No one would dispute that the plain language of DR 7-104(A)(1) contemplates the Rule's application when the parties are adverse. Nor would anyone dispute that at the initiation of criminal proceedings a defendant is adverse to the prosecutor. What is in dispute is whether there can be adversity under the Rule prior to the initiation of proceedings. If so, the DR should apply and the District Court was right to suppress the tape recordings.

The Court of Appeals' attempt to draw some significance to the Rule's use of the word "party" is flawed from the outset. Nothing in the Rule supports a limitation of its application to parties in actually-filed litigation. Indeed, DR 7-104(A)(1)'s successor, ABA Model Rules of Professional Conduct Rule 4.2, purports to be "substantially identical to DR 7-104(A)(1)," but uses the words "person" and "party" interchangeably and "covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." ABA Model Rules of Professional Conduct Rule 4.2, comment 3. No reasoned reading of the Rule supports a holding that a person is a "party" on the day a lawsuit is filed, and not the day before.[13]

---

[13] The Court of Appeals' interpretation of the rule is also contrary to virtually every court, bar association, and commentator

Neither can the court's references to Sixth Amendment jurisprudence support its decision. Cases addressing the Sixth Amendment right to counsel have adopted arrest or indictment as the critical point in time for attachment of rights because the Sixth Amendment explicitly states that the right to counsel attaches then. U.S. Const. amend. VI ("In all criminal *prosecutions*, the *accused* shall enjoy the right . . . to have the Assistance of Counsel for his *defence*") (emphasis added). The Sixth Amendment and DR 7-104(A)(1), however, serve different purposes.

The rights guaranteed by the Sixth Amendment are personal to the defendant and are intended to provide "the opportunity for a defendant to consult with an attorney, and to have him investigate the case and prepare a defense for trial." *Michigan v. Harvey*, —— U.S. ——, 110 S. Ct. 1176, 1179 (1990) (citations omitted). The purpose of the Disciplinary Rules, on the other hand, is to control the conduct of attorneys in their dealings with each other, and with the public, and to protect the integrity of the legal system. ABA Comm. on Prof. Ethics, Formal Opinion 108 (1934). They apply to all attorneys whether in private practice or engaged in Government service. *See* 28 C.F.R. § 45.735-1(b) (Department of Justice attorneys "should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association"); W.D. Okla. R. 4(J)(4)(b) (adopting Oklahoma Code of Professional Responsibility as ethical rules governing all attorneys practicing before that court).

---

to have considered the applicability of DR 7-104(A)(1) prior to commencement of formal proceedings. *See, e.g., In re FMC Corp.*, 430 F. Supp. 1108, 1111 (S.D.W. Va. 1977); N.Y. State Bar Ass'n Comm. on Prof. Ethics, Opinions, No. 607 (1990); N.Y.C. Bar Ass'n Comm. on Prof. Ethics, Informal Opinions, No. 79-13 (1979); J.M. Clark & C. Wolfram, *Professional Responsibility: Issues for Minnesota Attorneys*, Minn. State Bar Ass'n Cont. Legal Educ. 727 (1976); ABA Comm. on Prof. Ethics, Informal Opinions, No. 1373 (1976); ABA Comm. on Prof. Ethics, Informal Opinions, No. 1149 (1970); ABA Comm. on Prof. Ethics, Opinions, No. 95 (1933).

Even assuming Mr. Ryans did not have a "right" to counsel when the recordings at issue here were made, that assumption says nothing about whether he was "adverse" to the Government such that the Government's attorneys should have been "guided in their conduct" by DR 7-104 (A)(1). In this case, the investigation began in March, 1986. The F.B.I. agent concluded before the grand jury subpoenas were issued that Mr. Ryans had committed a crime, had targeted him for prosecution, and was determined to obtain his indictment and conviction. In fact, the Agent so informed Mr. Ryans prior to the third recorded conversation. Certainly, at least from the Government's point of view, the parties were adverse. Mr. Ryans was not a "suspect" as the Court of Appeals characterized him; he was truly a target of prosecution. A finding otherwise simply ignores reality.[14]

In some situations, the Government's interests may not be adverse to those it is investigating. The Government may only be investigating to determine whether a crime had been committed. But that is not this case. The Government had already decided a crime had been committed. When these interviews were made, Mr. Ryans had been implicated by a purported accomplice, "targeted" by the F.B.I. for prosecution, and received a subpoena from a grand jury. The meaning of "adversity" is not so slippery as the Court of Appeals would have it. As Judge Weinstein noted in *United States v. Jamil*, 546 F. Supp. 646 (E.D.N.Y. 1982), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983):

---

[14] The Tenth Circuit's rule would permit unconscionable mischief by Government attorneys. For example, the rule would permit a Government attorney to engage defense counsel in extensive plea negotiations during grand jury proceedings, and nevertheless disguise himself or herself and personally contact the target to obtain admissions. Counsel for the Department of Justice conceded this result during oral argument in response to a question from the Tenth Circuit panel.

> In white-collar crimes . . . the most critical phase is often before indictment; it is then that the skilled attorney uses persuasion and negotiation to forestall or shape the potential prosecution. Under DR 7-104 (A) (1) it is not material ethically that the client has not technically become a party by indictment, arraignment or arrest.

546 F. Supp. at 654.[15]

The Court of Appeals' conclusion that "the adversarial process had not yet begun" because Mr. Ryans had not yet been "faced with the prosecutorial forces of organized society" prior to the indictment has no basis in the facts of this case. App. p. 18. The court reaches its conclusion without attempting to describe how the interests of the Government lawyers were any less adverse to Mr. Ryans when these surreptitious tapes were made than after the indictment; or how the dangers against which the ethical rule is intended to protect were any less present. Indeed, the need for the ethical rule's protection would seem to be even greater before indictment because after indictment the defendant would presumably be even more careful of his words and to whom he speaks. *Cf. Patterson v. Illinois*, 487 U.S. 285, 299 (1988) ("the full dangers and disadvantages of self-representation during questioning are less substantial and *more obvious* to an accused [after indictment] than they are at trial") (em-

---

[15] The error of the Court of Appeals' decision is even clearer when viewed in light of other facts of this case. The tapes of the interviews were made in May and June of 1986. The Government claims that Mr. Ryans admitted in these tapes to committing the crimes with which he is charged. Yet Mr. Ryans was not indicted until January, 1989, two and one-half years later. According to the Court of Appeals, there was still no adversity for purposes of the ethical rule for two and one-half years after these tapes had been made, and the prosecutors could have directly contacted Mr. Ryans at any time during that period. This is precisely the danger the court found in *Hammad* to caution against applying the DR only after indictment. 858 F.2d at 839.

phasis added, citation omitted). While knowing admissions to police and Government have been allowed when there is compliance with *Miranda*, in this case Mr. Ryans was deceived from knowing with whom he spoke and was prevented from understanding the importance of his conversations with Hughen, just the sort of trickery the DR seeks to avoid.

As this Court noted in *Patterson*, "[t]he State's decision to take the additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning . . . ." *Id.* at 289. The filing of the indictment against Mr. Ryans two and one-half years after these tapes were made did not increase his need for his counsel at questioning by prosecutors, nor did it change the prosecutors' ethical obligations. Even assuming he had no constitutional right to counsel prior to his indictment, Mr. Ryans had retained counsel, and the Canons of Ethics protect that choice. *Cf. Patterson*, 487 U.S. at 298 (noting distinction between a right to counsel and "[p]reserving the integrity of an accused's choice to communicate with [the Government] only through counsel").

The Court of Appeals' fear that affirming the District Court would impair the Government's ability to investigate crime is unfounded. The DR expressly applies only when the prosecution target is represented "in that matter." Thus, criminals who retain "house counsel" cannot claim the Rule's protection when they have not learned they are targets of prosecution, have not engaged their counsel regarding that prosecution, and have not made that representation known to the Government. This Court had no trouble making a similar distinction in *Maine v. Moulton*, 474 U.S. 159 (1985). In that case, a defendant indicted on one charge made incriminating statements to a Government agent about another crime. The Court held that statement could not be used in the original prosecution because the defendant had counsel

in that matter, *Id.* at 176-77, but could be used in the prosecution for the second crime because the defendant was not represented in that matter. *Id.* at 179-80. The same distinction can be made here without resort to the Court of Appeals' arbitrary bright-line rule.

The Court of Appeals was understandably reluctant to handcuff the Government in investigating and prosecuting crime, but in its reluctance it went too far. Instead of adopting a rule which allows Government attorneys to do their work while preserving the policies and protections afforded by the rules of ethics, it rigidly and arbitrarily adopted a hard-and-fast rule, which like most hard-and-fast rules, sweeps too far. The issue of application of ethical rules to Government attorneys is obviously an important one, but the Tenth Circuit's decision in this case solves the issue by eliminating the Rule's applicability altogether. This Court should grant a writ of certiorari to provide a rational, consistent ruling on this significant question and put to rest the conflict among the circuits.

III. MR. RYANS DID NOT WAIVE HIS ATTORNEY-CLIENT PRIVILEGE

The District Court also found the contents of the taped conversations were protected by the attorney-client privilege because they contained information Mr. Ryans had received from his counsel. The trial court concluded that Mr. Ryans did not waive this privilege by virtue of his disclosures to the Government informant. App. p. 31a. It found that because Mr. Ryans was misled into believing that he "shared a common plight" with Hughen, he could not be found to have intentionally relinquished a known right. *Id. See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The Court of Appeals found that the tapes were not protected by the attorney-client privilege because Mr.

Ryans had waived this protection by divulging his confidences to Hughen. App. p. 20a, n. 13. The Court of Appeals has erred on this important question. Mr. Ryans' disclosure to Hughen was not "inadvertent." There is no evidence that he did not "jealously guard" the privilege. *See Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981); *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).

At the time Mr. Ryans disclosed the content of his conversations with his attorney to Hughen, he believed that Hughen shared a "common plight" and was a co-defendant in the case, because of the Government lawyers' clever scheme to lead Mr. Ryans to believe that Hughen was also a target of the grand jury investigation. Thus, under the "joint defense" exception to the rules for waiver of the attorney-client privilege, Mr. Ryans' communications remained privileged though he revealed them to Hughen. *See, e.g., Hunydee v. United States*, 355 F.2d 183, 184-85 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347, 349-50 (9th Cir. 1964); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 512-14 (D. Conn. 1976); *In re Grand Jury Subpoena*, 406 F. Supp. 381, 389-92 (S.D.N.Y. 1975). The result should be no different in this case merely because Mr. Ryans and Hughen did not in fact share common concerns. The tape recordings were therefore properly suppressed by the trial court because their contents were protected by the attorney-client privilege.

CONCLUSION

The questions raised in this Petition are of great significance to prosecutors, defense attorneys, and district courts and have been resolved differently by the various Courts of Appeals. This Court should grant the writ of certiorari to decide this important question and resolve the conflict.

Respectfully submitted,

C. KEVIN MORRISON
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
1120 Twentieth Street, N.W.
Suite 750 South Building
Washington, D.C. 20036
(202) 822-9100

KINDANNE C. JONES
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
First Oklahoma Tower, Suite 800
210 West Park Avenue
Oklahoma City, Oklahoma 73102
(405) 232-2828

WILLIAM J. SKEPNEK *
SCOTT J. BLOCH
MARTHA J. AARON
STEVENS, BRAND, LUNGSTRUM, GOLDEN & WINTER
P.O. Box 189
Lawrence, Kansas 66044
(913) 843-0811

August 6, 1990

* Counsel of Record

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-6096

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.

DONALD EUGENE RYANS d/b/a
RYANS MOVING & STORAGE and WESTSIDE MOVERS,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CR-89-12-W)

[Filed May 8, 1990]

David Seidman, Attorney, Department of Justice, Washington, D.C. (Charles F. Rule, Assistant Attorney General, Judy L. Whalley, Deputy Assistant Attorney General, and John J. Powers, III, Attorney, Department of Justice, Washington, D.C.; Alan A. Pason, Katherine A. Schlech, Dana M. Campbell and David B. Shapiro, Attorneys, Department of Justice, Dallas, Texas, were also on the brief) for Plaintiff-Appellant.

William J. Skepnek, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Oklahoma City, Oklahoma (Kindanne C. Jones, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Oklahoma City, Oklahoma and C. Kevin Morrison,

Tulsa, Oklahoma, were also on the brief) for Defendant-Appellee.

Ellen Yankever Suni, University of Missouri at Kansas City School of Law, Kansas City, Missouri, for Amicus Curiae National Association of Criminal Defense Lawyers, Inc.

Before HOLLOWAY, Chief Judge, LOGAN and ANDERSON, Circuit Judges

---

HOLLOWAY, Chief Judge

The government appeals from a pretrial order of the district court granting the defendant-appellee's motion to suppress evidence as to two tape recordings in this criminal proceeding. This court has jurisdiction of the appeal pursuant to 18 U.S.C. § 3731.

I

A.

Defendant-appellee Donald Eugene Ryans ("Ryans") was charged with conspiring, together with unnamed co-conspirators, to restrain and suppress competition in the provision of moving services from Fort Sill, Oklahoma, in unreasonable restraint of interstate trade and commerce, in violation of Section 1 of the Sherman Act. Ryans moved to suppress three tape recordings of conversations between himself and Mr. Hughen, an immunized government informant, on the ground, *inter alia*, that the conversations were recorded in violation of Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility [hereinafter DR 7-104(A)(1), the "disciplinary rule", or the "rule"]. Following an evidentiary hearing,

the district court suppressed two of the tapes on the ground that the disciplinary rule had been violated. This appeal followed and this court stayed the trial pending the appeal.[1] We conclude that the district court erred in its application of the disciplinary rule in the circumstances of this case and improperly suppressed the recordings, and reverse.

In 1985 the Antitrust Division of the Department of Justice began a nationwide investigation of national moving carriers and agents who were engaged in the transport of household goods for military personnel. In March or April of 1986, attorneys in the Antitrust Division's Dallas, Texas, office instructed Special Agent Granville Long of the F.B.I. in Lawton, Oklahoma, to begin an investigation of movers at Fort Sill, Oklahoma. Shortly thereafter one of the suspected conspirators, Kenneth Hughen, then president of the local movers' association, agreed to cooperate with the government in exchange for immunity from prosecution. (Long Tr. at 19; Hughen Tr. at 68-70.)

Hughen agreed to record telephone conversations with numerous investigation "targets," including Ryans. (Long Tr. at 21.) Government prosecutors instructed Hughen to call members of the movers' association and engage in conversation concerning the alleged agreements and rate setting practices, and to record his conversations. (Hughen Tr. at 82-83.) The prosecutors acted primarily through Agent Long, although the record shows that on at least one occasion the government attorneys met directly with Hughen. (Hughen Tr. at 68-70.) Although Hughen had already agreed to cooperate with the government, the prosecutors issued a grand jury subpoena to Hughen, much like those issued to each of the investigation targets, to conceal his newfound loyalty. This stage of the investigation lasted approximately three months,

---

[1] Ryans does not challenge the district court's denial of his motion with respect to the one tape not suppressed. We are therefore concerned only with the second and third tape recordings.

during which time Hughen recorded some conversations. Three of these were telephone conversations with Ryans.

The first telephone call to Ryans occurred on May 19, 1986, five days after Ryans had been served with a federal grand jury subpoena duces tecum. A transcript of the conversation reveals that the two men discussed, among other things, the problems associated with complying with the subpoenas and the need for legal representation.[2] Hughen delivered the tape of the May 19 inter-

---

[2] The following dialogue occurred:

> Mr. Hughen: Have you talked to any attorney or anything like that? Do you plan—
>
> Mr. Ryans: I'm going—I'm going down tomorrow and go over that with old J. Roy [Cocke] and see what—
>
> Mr. Hughen: See what he has to say about it?
>
> Mr. Ryans: —see what he thinks.

Transcript of Conversation ("Tr. Conv."), May 19, 1986, p. 12, lines 2-7.

* * * *

> Mr. Ryans: Well, I don't know. I'm going to—I'm going down tomorrow and be advised.
>
> Mr. Hughen: Yeah. I think you should.

Id. at p. 16, lines 15-17.

* * * *

> Mr. Ryans: I'll just lay the cards out on the table and let him know, all that I know and all that's going on and then let him advise on it.
>
> Mr. Hughen: Yeah. Let him tell you, but—but you ought to tell him exactly what did happen and all that so—so he will know how to advise you.
>
> Mr. Ryans: Yeah, I'm going to tell him exactly.

Id. at p. 16, line 20 to p. 17, line 1; *see also id.* at p. 19, line 18 to p. 20, line 3.

* * * *

> Mr. Hughen: You might touch base with me after you talk to your lawyer and see what—let's kind of compare notes and see if our lawyers are all kind of going in the same direction and see if they're telling us about the same thing.

Id. at p. 21, lines 5-8.

view to Agent Long on May 29, 1986. (Long Tr. at 31/ Hughen Tr. at 99.)

The second tape recording was made on June 5, 1986. (Hughen Tr. at 100-101.) A transcript of this conversation also reveals that Ryans' legal representation was discussed. Ryans stated that he had met with and had obtained advice from his lawyer concerning the subject of the investigation. Indeed, in response to some prompting by Hughen, Ryans disclosed the substance of that advice. *See* Tr. Conv. at 26:8-29:18; 33:22 - 34:13. The June 5 tape was delivered to agent Long on June 12, 1986. (Hughen Tr. at 108.)

The third taped conversation between Hughen and the defendant occurred on June 18, 1986, six days after Long received the second tape and one day after Ryans delivered documents to Agent Long in compliance with the grand jury subpoena. (Long Tr. at 47-48.) A transcript of this conversation reveals that defendant Ryans reported to Mr. Hughen about his meeting with Agent Long the previous day and again discussed advice that he had received from counsel. Tr. Conv. at 42:18-21; 55:13-18; 61:24 - 63:4; 64:6-22.

Mr. Hughen's inquiries into the substance of Ryans' attorney-client communications were, according to agent Long, contrary to the instructions that he had given to Hughen sometime during the investigation.[3] (Long Tr. at 40-42.) Agent Long testified that sometime in May 1986 he advised one or more of the government prosecutors of his concerns regarding Mr. Hughen's performance as an informant. *Id.* The district court found that the government attorneys were aware that the recordings were being made and were informed of their contents. Order at 5.

---

[3] The district court doubted that any such instructions were given. "The more credible evidence supports a finding that these admonishments, if any were in fact given, were insufficient." Order at 3.

B.

Ryans was charged on January 19, 1989, in a one-count indictment with alleged price-fixing in violation of the Sherman Act, 15 U.S.C. § 1. Prior to trial Ryans moved to suppress introduction of the tapes on the ground that the conversations were recorded in violation of DR 7-104(A)(1). The district court denied the motion to suppress as to the first of the recordings, but granted Ryans' motion as to the second and third recordings.

The court found that "[a]t the time these [second and third] tapes were made, it was clear that defendant Ryans had retained counsel regarding the investigation for which the recordings were made", *id.* at 9, and that the government prosecutors knew, either directly or indirectly through Agent Long, that Ryans was represented by counsel. *Id.* The court further found that Mr. Hughen was acting under the direct control and supervision of Agent Long and that he "participated actively in the conversations and deliberately elicited information from the defendant in the absence of counsel regarding the alleged conspiracy and communications between the defendant and his counsel . . . ." Order at 8. The court concluded that the government attorneys investigating the case had breached their ethical obligations under the disciplinary rule.

The court then considered the available remedies, ranging from simple admonishment of the attorneys involved to dismissal of the indictment. The court thought that *United States v. Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973), might be controlling and accordingly imposed the intermediate remedy of suppression. (Order at 9.) The government appeals.

II

The issue presented on appeal is whether the government's use of an informant to initiate and record conversations with a suspect prior to indictment, but after the suspect has retained counsel in connection with the sub-

ject matter of the criminal investigation, violates Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility.[4] DR 7-104(A)(1) provides that

> During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Model Code of Professional Responsibility DR 7-104(a)(1).

Ryans contends, and the district court held, that the second and third tape recordings were made in violation of DR 7-104(A)(1) because at the time those tapes were made, Ryans was represented by counsel within the meaning of the rule, and that the government either directly or indirectly knew that Ryans was represented by counsel. Since Hughen was acting on behalf of the United States Attorney's office, all of his communications with Ryans were in violation of the rule and therefore should not be admitted in evidence. The government argues that Ryans was not represented by counsel within the meaning of the rule, and that in any case the disciplinary rule is not intended to prohibit investigative contact with a person—even if represented by counsel—prior to the ac-

---

[4] The Code is not controlling in the federal courts, but it may be enforced pursuant to the courts' inherent supervisory power over the attorneys practicing before them. *In re Snyder*, 472 U.S. 634, 645 n.6 (1985). The Western District of Oklahoma, through Local Rule 4(J)(4)(b), has incorporated those rules of professional responsibility adopted by the Oklahoma Supreme Court. Although the Oklahoma Court has since adopted the ABA Model Rules of Professional Conduct to govern attorneys' conduct in Oklahoma (effective July 1, 1988), at the time of the recordings at issue the Code of Professional Responsibility was in effect in Oklahoma.

cusatory phase of the criminal process. By analogy to the Sixth Amendment, the government argues that the rule should not attach until adversary proceedings have commenced.

With the exception of the district court's finding that Ryans did not waive the attorney-client privilege, *see* note 13 *infra*, we accept the factual findings made below. With that exception, we believe the subsidiary historical factual findings of the court are supported by the record and therefore are not clearly erroneous.[5] As our analysis shows, we disagree with the legal conclusion of the district court that the disciplinary rule applies before the commencement of adversarial proceedings.

We first consider whether Ryans was entitled to the protection of DR 7-104(A)(1) when the recordings were made in May and June of 1986, that is approximately two and one-half years prior to his indictment by the grand jury in January of 1989. The parties do not dispute the applicability of DR 7-104(A)(1) to criminal cases, to public prosecutors, or to their agents, when they act as the "alter ego" of prosecuting attorneys. *Cf. United States v. Massiah*, 307 F.2d 62, 66 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201 (1964). It is now well settled that DR 7-104(A)(1) applies to criminal prosecutions as well as to civil litigation. *United States v. Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *see also United States v. Hammad*, 858 F.2d 834, 837-38 (2d Cir. 1988); *United States v. Jamil*,

[5] The government vigorously disputes the district court's findings that "Ryans had retained counsel regarding the investigation for which the recordings were made," and that the prosecuting attorneys knew, either directly or indirectly, that Ryans was represented by counsel by the time the second and third tape recordings were made. *See* Order at p. 9. Although the record evidence is not overwhelming, we believe it amply supports the district court's conclusions. In any case, our decision on the applicability of the disciplinary rule to the facts of this case renders a closer evaluation of the government's position on this point unnecessary.

707 F.2d 638, 645 (2d Cir. 1983) ("DR 7-104(A)(1) may be found to apply in criminal cases . . . to government attorneys [and] to non-attorney government law enforcement officers when they act as the alter ego of government prosecutors."); ABA Standards Relating to the Administration of Criminal Justice, Standard 3-4.1 (commentary).

The applicability of DR 7-104(A)(1) to the investigative stage of a criminal prosecution presents a more difficult question. The federal courts of appeal that have considered this question are not in agreement. A number of courts have held that DR 7-104(A)(1) does not apply to situations like the one before us. *See United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), (pre-indictment use of informant to gather information against represented suspect did not violate the rule), *cert. denied*, 464 U.S. 852 (1983); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.) ("the government's use of such investigative techniques at this stage of a criminal matter does not implicate the sorts of ethical problems addressed by the Code."), *cert. denied*, 452 U.S. 920 (1981); *United States v. Lemonakis*, 485 F.2d 941, 955 (D.C. Cir. 1973) (disciplinary rule not applicable prior to indictment and in any case, use of an informant to initiate and record conversations with the defendant prior to his arrest or indictment did not violate the rule), *cert. denied*, 415 U.S. 989 (1974).

Three circuits, including this one, have held that the rule either does or may apply to a *custodial*, pre-indictment interview of a defendant in the absence of and without the consent of retained counsel. *See United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.) (custodial, post-arrest interview), *cert. denied*, 412 U.S. 932 (1973); *see also United States v. Killian*, 639 F.2d 206, 210 (5th Cir.) (same), *cert. denied*, 451 U.S. 1021 (1981); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973)

(custodial, pre-indictment interview of a defendant in the absence of retained counsel "raise[s] ethical questions" under DR 7-104(A)(1)). Here we clearly are not concerned with a custodial interview.

Only the Second Circuit has purported to apply the rule in a non-custodial, pre-indictment setting. *See United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988).[6] However, the *Hammad* court did not enforce the rule there because, the court said, "the government should not have its case prejudiced by suppression of its evidence when the law was previously unsettled in this area." 858 F.2d at 842.[7]

In *United States v. Thomas*, this court addressed the applicability of the disciplinary rule only in the limited context of a custodial, albeit pre-indictment, interview between a government agent and a defendant. There a special agent of the Albuquerque Bureau of Narcotics and Dangerous Drugs interviewed Thomas in prison at Thomas' request in the absence of and without the knowledge of his attorney. After signing a waiver of his Miranda rights, Thomas gave the investigator a written statement. Although the defendant was not indicted until one day after the interview, he had been formally served with a criminal complaint on September 21, 1971; had counsel appointed on September 22; had appeared together

---

[6] Prior to the Second Circuit's decision in *Hammad*, that court considered the applicability of DR 7-104(A)(1) to criminal investigations "doubtful," *see United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982), but the question remained open until *Hammad*. *See, e.g., United States v. Jamil*, 707 F.2d 638, 646 (2d Cir. 1983).

[7] In *United States v. Schwimmer*, 882 F.2d 22 (2d Cir. 1989), the Second Circuit held that DR 7-104(A)(1) does not preclude a prosecutor from questioning a convicted defendant known to be represented by counsel before a grand jury. The court distinguished *Hammad* and held that the appearance and questioning of an immunized witness before a grand jury is "authorized by law" and therefore does not transgress the disciplinary rule. 882 F.2d at 28-29.

with his appointed counsel at a preliminary hearing on September 28; and was in the custody of the state when the interview was conducted October 18, 1971.

At Thomas' trial, the statement was admitted over the objection of defense counsel and used during Thomas' cross-examination by the prosecution. The court held that this use of the statement violated both the letter and the spirit of the canons of ethics, 474 F.2d at 112, but refused to reverse the conviction because "[w]e have not passed on this question before and the prosecution had no notice of the position of this court on the subject until this appeal." *Id.* at 112. However, the court left no doubt that in the future evidence gathered through such violative conduct must be excluded.

> [O]nce a criminal *defendant* has either retained an attorney or had an attorney appointed for him by the court any statement obtained by interview from such defendant may not be offered in evidence for any purpose unless the *accused's* attorney was notified of the interview which produced the statement and was given a reasonable opportunity to be present.

Id. at 112. (emphasis added). Ryans now urges this court to extend the rule announced in *Thomas* to the situation before us: a non-custodial setting, prior to Ryans' charge, arrest, or indictment.

Although the interview in *Thomas* occurred prior to his indictment, the formal adversary process had clearly begun. Thomas' Sixth Amendment right to counsel had already attached. *See Moran v. Burbine*, 475 U.S. 412, 428-30 (1986) (right to counsel attaches upon "first formal charging proceeding" or as soon as "the government's role shifts from investigation to accusation."); *see also Kirby v. Illinois*, 406 U.S. 682, 689 (1972). We recognize that the court's language in *Thomas* might be read to apply to a non-custodial environment like the one before us, but we do not believe that *Thomas* re-

quires a broader rule than was required by the facts before the court then. *Thomas* relied on authority from the Fifth and Ninth Circuits that involved the application of the then applicable canon of ethics only to custodial interrogation of the accused after the adversary process had begun. *See United States v. Four Star*, 428 F.2d 1406, 1407 (9th Cir.) (condemning "in-custody interrogation of an accused person known to be represented by counsel without affording counsel an opportunity to be present."), *cert. denied*, 400 U.S. 947 (1970); *Wilson v. United States*, 398 F.2d 331, 333 (5th Cir. 1968) (denouncing "[g]overnment interrogation of a person in custody pending trial, in the absence of counsel which the interrogator knew had been appointed to represent the defendant"), *cert. denied*, 393 U.S. 1069 (1969); *Coughlan v. United States*, 391 F.2d 371, 372 (9th Cir.) (denouncing interviews of "accused persons in jail in the absence of counsel"), *cert. denied*, 393 U.S. 870 (1968). Nothing in the court's opinion in *Thomas*, or in the cases upon which it relied, suggests that the court intended to extend the protections of the disciplinary rule to non-custodial, pre-indictment investigative interviews.

Moreover, the rule announced in *Thomas* is expressed in terms that clearly contemplate an adversial relationship between the state and the defendant. *See Thomas*, 474 F.2d at 112 (holding expressed in terms of the "criminal defendant", and the "accused"). We again emphasize the factual setting in *Thomas*: the defendant had been served with a criminal complaint, had had counsel appointed for him, had appeared with appointed counsel at a preliminary hearing, and was in custody at the time of the interview. We are persuaded that use of a statement obtained from the defendant under those circumstances, without the benefit of counsel, raises considerations qualitatively different from those presented here.

Ryans relies heavily on the Second Circuit's decision in *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988),

and urges that we adopt its reasoning here. In *Hammad*, a government prosecutor directed an informant to arrange and record a meeting with represented suspects in an arson investigation. The prosecutor supplied the informant with a fictitious grand jury subpoena to "create a pretense that might help the informant elicit admissions . . . ." 858 F.2d at 840.[8] The meeting occurred six months before the grand jury returned an indictment, which was based in large part on the informant's recordings. The trial court found that the government "was clearly aware" that the suspect was represented by counsel at the time of the meeting and suppressed the tapes. *United States v. Hammad*, 678 F. Supp. 397 (E.D.N.Y. 1987). On appeal, the Second Circuit held that the disciplinary rule applied, and that "in light of the underlying purposes of the professional responsibility code and the exclusionary rule, suppression may be ordered [for a prosecutor's violation of DR 7-104(A)(1)] in the district court's discretion," 858 F.2d at 840, but reversed the district court's suppression of evidence under the rule as an "abuse of discretion." *Id.* at 837.

---

[8] Ryans argues that Hughen's subpoena was a "sham" inasmuch as Hughen's agreement to cooperate with the government made it unnecessary. He argues, therefore, that it is indistinguishable from the subpoena condemned as a "sham" in *United States v. Hammad*. We do not agree. The Second Circuit relied on *United States v. Martino*, 825 F.2d 754 (3d Cir. 1987) for the proposition that fake subpoenas were improper, but that case seems to say exactly the opposite. *See id.* at 760 ("If government officials may pose as nonexistent sheiks in an elaborately concocted scheme . . . , supply a necessary ingredient for a drug operation . . . , and utilize landing strips, docking facilities, and other accoutrements of an organized smuggling operation . . . , all in order to catch criminals, then their use of a subpoena in the name of an undercover agent to enable him to retain his credibility with suspected criminals seems innocuous by comparison."). In any event, the subpoena at issue in this case was not fictitious; it was simply unnecessary. Government agents may "employ appropriate artifice and deception to ferret out illegal activities." *United States v. Szycher*, 585 F.2d 443, 449 (10th Cir. 1978).

The court first rejected the government's argument that DR 7-104(A)(1) is co-extensive with the Sixth Amendment, and hence, inapplicable prior to indictment. The court noted several decisions applying the rule irrespective of the Sixth Amendment, especially Judge Weinstein's opinion in *United States v. Jamil*, 546 F. Supp. 646, 655-58 (E.D. N.Y. 1982):

> Judge Weinstein . . . exhaustively considered the government's contention that DR 7-104(A)(1) is co-extensive with the Sixth Amendment. He noted that several courts have hinted at this unity and treated the disciplinary rule as little more than an appendage to the constitutional provision, without independent import in this context. Such treatment, however, makes the rule superfluous, and 'is neither apparent nor compelling.' The Sixth Amendment and the disciplinary rule serve separate, albeit, congruent purposes.

858 F.2d at 838-39 (citations omitted). Following this lead, the court reasoned that whereas the Constitution defines only the "minimal historic safeguards" which criminal defendants must receive (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)), the Model Code of Professional Responsibility imposed a broader duty on attorneys "to maintain the highest standards of ethical conduct." (quoting Preamble, Model Code of Professional Responsibility (1981)). The court said:

> The Code is designed to safeguard the integrity of the profession and preserve public confidence in our system of justice. It not only delineates an attorney's duties to the court, but defines his relationship with his client and adverse parties. Hence, the Code secures protections not contemplated by the Constitution.

858 F.2d at 839.

Finally, the *Hammad* opinion rejected the invitation to tie the Code's applicability to the time of indictment. The court reasoned that because the timing of an indictment's return lies substantially within the control of the prosecutor, "a government attorney could manipulate grand jury proceedings to avoid its encumbrances." *Id.*

Having decided that DR 7-104(A)(1) applies in a pre-indictment, non-custodial context, the court was faced with a dilemma: how to apply the rule to communications made during a criminal investigation without crippling legitimate law enforcement activity. *See, e.g., United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983). Rejecting the district court's limiting construction of the rule, *see Hammad*, 678 F. Supp. at 401, the court instead carved out an exception to the rule for "legitimate investigative techniques." 858 F.2d at 839. The court reasoned that, by its terms, DR 7-104(A)(1) only applies to attorney communications that are not otherwise "authorized by law." Therefore, since a prosecutor's office authorizes him to conduct and supervise criminal investigations, "[a]s we see it, under DR 7-104(A)(1), a prosecutor is 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization." 858 F.2d at 839. The court agreed with the district court's conclusion that the use of a sham subpoena was improper and thus not protected by this exception. Nevertheless, the Second Circuit reversed the district court's suppression of evidence under the rule as an abuse of discretion, reasoning that "the government should not have its case prejudiced by a suppression of its evidence when the law was previously unsettled in this area." *Id.* at 842.

We must disagree with the *Hammad* opinion's interpretation of the rule. We are not convinced that the language of the rule calls for its application to the investigative

phase of law enforcement. In contrast to DR 7-104(A)(2), which prohibits a lawyer representing a client from giving advice to a "person" who is not represented by counsel, DR 7-104(A)(1) prohibits communications with a "party." Black's Law Dictionary defines party as "a litigant, or a person directly interested in the subject matter of a case." Moreover, the rule concerns a lawyer's conduct "[d]uring the course of his representation of a client," and is limited to communication "on the subject matter of the representation" with a party represented by counsel "in that matter." Although the Code does not define these terms, the rule appears to contemplate an adversarial relationship between litigants, whether in a criminal or a civil setting. This interpretation is consistent with the policies underlying the disciplinary rule and the ethical canon from which it derives. We agree, for example, with the District of Columbia Circuit's conclusion that the contours of the "subject matter of the representation" are uncertain during the investigative stage of the case, and therefore less susceptible to the damage of "artful" legal questions which the disciplinary rule is designed in part to avoid. *See Lemonakis*, 485 F.2d at 956.

The rule requires that the lawyer respect an adverse party's choice to be represented by skilled counsel. The rule appears to be intended "to protect a defendant from the danger of being 'tricked' into giving his case away by opposing counsel's artfully crafted questions." *Jamil*, 707 F.2d at 646. Logically, these concerns are implicated after the parties are in an adversarial relationship. *Cf. United States v. Gouveia*, 467 U.S. 180, 189 (1984) (Sixth Amendment right to counsel attaches only where "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.").

During the investigative stage of a criminal proceeding, counterveiling policies militate against a broad reading of DR 7-104(A)(1). We agree with the majority of

courts which have considered the question that DR 7-104 (A)(1) was not intended to preclude undercover investigations of unindicted suspects merely because they have retained counsel. *See United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.) ("We do not believe that DR 7-104(A)(1) . . . was intended to stymie undercover operations when the subject retains counsel."), *cert. denied*, 464 U.S. 852 (1983); *United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982) (per curiam) ("Such a principle would simply enable criminal suspects, by retaining counsel, to hamper the government's conduct of legitimate investigations. Even assuming this provision of the Code to be applicable to a criminal investigation, which is doubtful, it was not intended to lead to such a result."); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.) ("[T]he government's use of such investigative techniques at this stage of a criminal matter does not implicate the sorts of ethical problems addressed by the Code."), *cert. denied*, 452 U.S. 920 (1981); *United States v. Lemonakis*, 485 F.2d 941, 955-56 (D.C. Cir. 1973) (the "communication" proscribed by the Code "does not in our view embrace the initiation and recording of the conversations between [the informant] and appellants."), *cert. denied*, 415 U.S. 989 (1974). A broader interpretation of the rule to cover this type of investigative activity would seem inconsistent with the general view expressed by the Supreme Court in *Hoffa v. United States*, 385 U.S. 293 (1966). As the District of Columbia Circuit observed in *Lemonakis*:

> [W]e cannot say that at this stage of the Government's investigation of a criminal matter, the public interest does not . . . permit advantage to be legally *and ethically* taken of 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'

Lemonakis, 485 F.2d at 956 (quoting *Hoffa*, 385 U.S. at 302) (emphasis added). Under Ryans' view of the rule,

once the subject of an investigation retains counsel, investigators would be unduly restricted in their use of informants to gather additional evidence.[9]

We hold that DR 7-104(A)(1)'s proscriptions do not attach during the investigative process before the initiation of criminal proceedings. On these facts, we hold that the adversarial process had not yet begun. Although Ryans had been targeted for investigation and had been served with a grand jury subpoena duces tecum, he had not been charged, arrested or indicted, or otherwise "faced with the prosecutorial forces of organized society, and immersed with the intricacies of substantive and procedural criminal law." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (describing the onset of adversarial proceedings for purposes of the Sixth Amendment right to counsel); *see Fitterer*, 710 F.2d at 1333 (rejecting contention that where counsel had been retained for grand jury investigation, DR 7-104(A)(1) was intended to restrict undercover investigations).

Ryans argues that the interpretation of the disciplinary rule we adopt renders it meaningless in the criminal context because it gives no protections beyond those provided by the Sixth Amendment and the decisions which implement it. We do not agree. The argument overlooks the fact that exclusion of evidence is not the only possible remedy under the disciplinary rule. Violations of DR 7-104(A)(1) may furnish a basis for sanctions against the offending attorneys. We do not address appropriate remedies for violations of DR 7-104(A)(1) here since we hold that the rule does not apply until the commencement of criminal proceedings.

---

[9] The Second Circuit recognized that a broad reading of the disciplinary rule would impede investigatory practices, *see, e.g., Hammad*, 858 F.2d at 839 (noting that career criminals with permanent "house counsel" could immunize themselves from infiltration by informants, especially where counsel are retained in connection with an ongoing fraud or criminal enterprise), and therefore exempted such practices from the rule's prohibitions.

The amicus argues that remedial action is warranted in this case because the prosecutor permitted Hughen to systematically invade Ryans' attorney-client relationship. The important policies underlying the disciplinary rule would be undermined, the amicus says, if the fruits of the prosecutor's "orchestrated effort to obtain information from defendant and others in this case" are not suppressed. While we agree that this is a troubling issue and do not commend the government's conduct, we do not believe that the disciplinary rule should apply in these circumstances. We are persuaded that the perceived threat to the integrity of the attorney-client relationship is outweighed here by the government's interest in effective law enforcement.[10] When the government's role shifts from investigation to accusation, however, then the balance of the interests at stake shifts. Clearly, if adversary proceedings had begun here, this would be a different case. *Cf. Maine v. Moulton*, 474 U.S. 159 (1985); *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964).[11]

The district court was concerned with Hughen's persistent inquiry into confidential attorney-client communication, not only in his conversations with Ryans, but also

---

[10] This is clearly not an example of government conduct that is "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431-32 (1973); *see United States v. Warren*, 747 F.2d 1339, 1341-44 (10th Cir. 1984); *United States v. Gamble*, 737 F.2d 853, 856-60 (10th Cir. 1984).

[11] This is not a case where government prosecutors have placed an informant directly in the "defense camp" (of an indicted defendant) and thereby gained access to confidential defense planning. Such a knowing invasion of the defense camp would taint the entire prosecution with a Sixth Amendment violation. *See Weatherford v. Bursey*, 429 U.S. 545 (1977); *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978).

in his conversations with the other association members.[12] Thus, at the evidentiary hearing on Ryans' suppression motion, the court asked counsel to address in their briefs to the court the "heightened sensitivity, if any, we have in this case by reason of the interrogations with regard to the . . . attorney/client communications . . . ." (Tr. at 85). We feel the purpose of the disciplinary rule is to prohibit *all* communications between an attorney and a represented party, but after initiation of adversary proceedings. It does not afford any special protection to communications otherwise protected by the attorney-client privilege.[13]

---

[12] Of the 991 pages of transcript of conversations recorded by Hughen, 302 pages contain references to the subjects' communications with their attorneys. (Tr. at 85; Def.'s Exh. 5).

[13] We note that these tapes are not protected by the attorney-client privilege. The attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party. *United States v. Bump*, 605 F.2d 548 (10th Cir. 1979); *see also United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982) ("any voluntary disclosure by the client to a third party waives the privilege"). This is true even if the disclosure is inadvertent. *See e.g., Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981) (voluntary disclosure of the content of a privileged attorney communication, even if inadvertent, "constitutes waiver of the privilege"); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984) (same); *In re Grand Jury Investigation*, 604 F.2d 672, 675 (D.C. Cir.) ("An intent to waive [the attorney-client] privilege is not necessary for such a waiver to occur."), *cert. denied*, 444 U.S. 915 (1979); 8 Wigmore on Evidence § 2327 at 635 (McNaughton rev. 1961 & 1987 Supp.). *But see Helman v. Murry's Steaks, Inc.*, 728 F. Supp. 1099, 1104 (D. Del. 1990) (indavertent disclosure *by counsel* does not waive the privilege). Here, Ryans willingly, though unwittingly, disclosed the substance of his attorney's advice to Hughen, and thereby waived the privilege. "[T]he confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant." *In Re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).

III

Accordingly, the district court's order suppressing the second and third tape recordings is REVERSED; the order staying trial on the instant criminal charge is VACATED; and the cause is REMANDED to the district court for further proceedings in accord with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-6096

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DONALD EUGENE RYANS, doing business as Westside Movers, doing business as Ryans Moving & Storage,
Defendant-Appellee.

ORDER

Filed July 10, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member

of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CR-89-12-W

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DONALD EUGENS RYANS d/b/a
RYANS MOVING & STORAGE and WESTSIDE MOVERS,
Defendant.

ORDER

[Filed Mar. 23, 1989]

This matter came on for hearing on the Motion to Suppress of the defendant, Donald Eugene Ryans d/b/a Ryans Moving and Storage and Westside Movers, filed pursuant to Rule 41(f), F.R.Crim.P., to determine the circumstances surrounding the interception and recording of three telephone conversations which the plaintiff, United States of America, intends to offer into evidence at the defendant's trial. After consideration of the testimony, the exhibits, the arguments of counsel and the authorities submitted by the parties, the Court makes its determination.

1. Ken Hughen is the owner of Associated Van and Storage Company in Lawton, Oklahoma, and was president of the Southwest Movers Association (Association).

2. In March or April 1986, Mr. Hughen met with Granville Long, Special Agent, Federal Bureau of Investigation (FBI), assigned to investigate allegations of a

price-fixing conspiracy among moving and storage agents serving Fort Sill, Oklahoma.

3. Mr. Hughen agreed to obtain evidence regarding the alleged price-fixing and to testify for the government in exchange for personal immunity from any charges resulting from the investigation.

4. Mr. Hughen testified that shortly after meeting with Agent Long, he (Mr. Hughen) also met with Allen Payzant, Jane Phillips and/or Carl LoPresti, attorneys for the United States Department of Justice, Antitrust Division, located in Dallas, Texas.

5. Agent Long (in contradiction to Mr. Hughen's subsequent statement that his conversations with these individuals may have occurred much later) testified that Mr. Payzant was involved in the agreement negotiations with Mr. Hughen which occurred in March or April 1986.

6. Mr. Hughen also agreed during his period of cooperation to permit law enforcement officers to install a recording device on his office telephone and to permit a wire transmitter to be put on his body whereby he could record telephone calls and conversations between himself and other Association members.

7. Mr. Hughen received oral instructions from Agent Long and FBI Special Agent Nelson Bose regarding the recording devices and the manner in which contacts with Association members were to be made. Agent Long advised Mr. Hughen to tape all "normal" conversations with any Association members, to engage in conversation about agreements and rates and to avoid excessive discussion of matters unrelated to the investigation.

8. While Agent Long testified that he cautioned Mr. Hughen from the outset regarding inquiry about attorneys and legal advice given to Association members, Mr. Hughen's testimony was unclear and contradictory as to when such admonishments occurred. The more credible

evidence supports a finding that these admonishments, if any were in fact given, were insufficient.

9. The first of the three telephone conversations between defendant Ryans and Mr. Hughen which are the subject of the instant motion occurred on May 19, 1986, five days after defendant Ryans was served with a federal grand jury subpoena duces tecum. A transcript of the conversation reveals that the two men discussed inter alia the need for legal representation. The following dialogue occurred:

> Mr. Hughen: Have you talked to any attorney or anything like that? Do you plan—
>
> Mr. Ryans: I'm going—I'm going down tomorrow and go over that with old J. Roy [Cocke] and see what—
>
> Mr. Hughen: See what he has to say about it?
>
> Mr. Ryans: —see what he thinks.

Transcript of Conversation (May 19, 1986), p. 12, lines 2-7.

> Mr. Ryans: Well, I don't know. I'm going to—I'm going down tomorrow and be advised.
>
> Mr. Hughen: Yeah. I think you should.

Id. at p. 16, lines 15-17.

> Mr. Ryans: I'll just lay the cards out on the table and let him know, all that I know and all that's going on and then let him advise on it.
>
> Mr. Hughen: Yeah. Let him tell you, but—but you ought to tell him exactly what did happen and all that so—so he will know how to advise you.
>
> Mr. Ryans: Yeah, I'm going to tell him exactly.

Id. at p. 16, line 20 to p. 17, line 1; *e.g.*, *id.* at p. 19, line 18 to p. 20, line 3.

> Mr. Hughen: You might touch base with me after you talk to your lawyer and see what—let's

> kind of compare notes and see if our lawyers are all kind of going in the same direction and see if they're telling us about the same thing.

Id. at p. 21, lines 5-8.

10. On June 5, 1986, the second conversation between the defendant and Mr. Hughen occurred. A transcript of this conversation also reveals that the defendant's legal representation was discussed. Transcript of Conversation (June 5, 1986), p. 27, line 1 to p. 29, line 18; p. 33, line 22 to p. 34, line 13.

11. On June 17, 1986, defendant Ryans complied with the grand jury subpoena duces tecum and delivered the requested documents to Agent Long in Lawton, Oklahoma.

12. On June 18, 1986, the third conversation between defendant Ryans and Mr. Hughen occurred. A transcript of this conversation reveals that defendant Ryans reported to Mr. Hughen about his meeting with Agent Long the previous day and again, discussed advice received from counsel. Transcript of Conversation (June 18, 1986), p. 42, lines 18-21; p. 55, lines 13-18; p. 61, line 24 to p. 63, line 4; p. 64, lines 6-22.

13. Agent Long testified that during the course of Mr. Hughen's period of cooperation, he (Agent Long) was in contact with Messrs. LoPresti and Payzant and Ms. Phillips and that he reported the information obtained during the recording sessions. He also testified that in May 1986 he advised one or more of these government attorneys of his concerns regarding Mr. Hughen's performance as an informant. Thus, it appears that government attorneys were aware that the recordings were occurring and of the information gained thereby. It also appears that while government attorneys gave no instructions regarding the method or manner in which Mr. Hughen conducted his interviews, they did not insist on termination of the interviews upon receipt of the information (including knowledge, actual or constructive, of

communications between the defendant and his counsel) from Agent Long.

14. Defendant Ryans was charged on January 19, 1989, in a one-count Indictment with alleged price-fixing in violation of the Sherman Act, 15 U.S.C. § 1.

15. For purposes of the Motion to Suppress, the Court has examined the transcripts of the conversations between Mr. Hughen and other Association members. Review of such transcripts was not to determine whether any ethical duties to others had been breached but rather to ascertain Mr. Hughen's method and manner of conducting the interviews throughout the period of cooperation.

The first ground advanced by the defendant in support of his request for suppression is that Mr. Hughen's consent to record the conversations was not voluntarily given and thus, in the absence of any court authorization, the recorded conversations must be suppressed. 18 U.S.C. § 2515. The evidence demonstrates that Mr. Hughen consented to the installation of the recording devices and that such consent was voluntarily given and not the product of duress or threats. Accordingly, suppression for this reason is not required.

The second ground advanced by the defendant is that the recorded conversations violated Disciplinary Rule (DR) 7-104(A)(1) of the American Bar Association's Model Code of Professional Responsibility. This Rule provides that during the course of his representation of a client, a lawyer shall not

> "[c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

DR 7-104(A)(1). This restriction, as are all professional responsibility standards, is enforced by this Court pur-

suant to its inherent supervisory power over members of the bar. *In re Snyder*, 472 U.S. 634, 645 n.6 (1985). Likewise, this judicial district has incorporated through Rule 4(J)(4), Rules of the United States District Court for the Western District of Oklahoma, those professional responsibility standards adopted by the Oklahoma Supreme Court. *See* Rule 4.2, 5 O.S. Chap. 1, App. 3.

As counsel discussed at the hearing, this case presents the issue of whether DR 7-104(A)(1) is violated by the actions of a cooperating witness who under the direction and supervision of a law enforcement officer initiates contact with one suspected of wrongdoing when the latter is represented by counsel and interviews that person not only about the alleged wrongdoing but also about his legal representation. The parties generally have agreed that DR 7-104(A)(1) applies to criminal investigations, to government attorneys and to law enforcement officials when they act as the alter egos of government attorneys. They however have disagreed on the Rule's applicability to this case. The defendant has argued the Rule not only is applicable but also has been violated that since he had retained counsel at least by the time the second conversation was recorded and such fact was known to Mr. Hughen (and Agent Long). The government has argued that the Rule is not applicable since the conversations occurred preindictment and in noncustodial settings and since Agent Long is not the alter ego of the government attorneys.

As the United States Court of Appeals for the Second Circuit in *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988), declined to list all possible situations that may violate DR 7-104(A)(1), this Court too declines to announce any bright-line rule. It instead finds as the Second Circuit recognized application of this Rule must be made on a case-by-case basis, *id.*, and in this case, the Court finds that DR 7-104(A)(1) is applicable despite the fact that the conversations occurred preindict-

ment and in noncustodial situations, that it has been violated and that some relief is warranted.

Mr. Hughen was acting under the direct control and supervision of Agent Long; he initiated contact with Association members at Agent Long's request, recorded their conversations and delivered the tapes to Agent Long for replay and review. Mr. Hughen during this period of cooperation was a government informant who had been promised personal immunity and who had an incentive to produce useful information. He participated actively in the conversations and deliberately elicited information from the defendant in the absence of counsel regarding the alleged conspiracy and communications between the defendant and his counsel, J. Roy Cocke. Mr. Hughen's repeated inquiry into these communications was more than an attempt "to keep the conversation going" as he testified.

The government has argued that it should not be held accountable for Mr. Hughen's conduct because Agent Long had instructed Mr. Hughen not to inquire into defendant Ryans' legal representation, the subject matter of which representation was clearly defined. However, these admonitions were clearly insufficient in light of the constant and repeated references to counsel in the transcripts.

Mr. Hughen and Agent Long knew that defendant Ryans intended to retain counsel. Agent Long did not advise Mr. Hughen to terminate contact with defendant Ryans; rather, two additional conversations were recorded wherein defendant Ryans in the absence of counsel revealed information not only about the alleged conspiracy but also about the representation itself. Agent Long testified that he was in contact with government attorneys throughout the taping process and that he advised them of the information obtained thereby. Accordingly, through their own knowledge or because Agent

Long's actions are imputed to them, these government attorneys (and thus, their successors) must be held responsible for any violation of this disciplinary rule and be subject to the consequences resulting therefrom.

The Court finds further that there has been no persuasive argument presented by the government that defendant Ryans waived any rights he possessed by revealing information to Mr. Hughen. Waiver is the intentional relinquishment of a known right, *e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and the Court finds that defendant Ryans' statements were made only because he thought Mr. Hughen shared a common plight and that such statements would not have been made to one known to be an informant.

The suggested remedies for a violation of the Rule range from dismissal of the Indictment to admonishment of Agent Long. The Court finds under the circumstances that the more appropriate remedy in this case (and perhaps the mandated remedy, *e.g.*, *United States v. Thomas*, 474 F.2d 110 (10th Cir. 1973)), is exclusion of the conversations recorded on June 5, 1986, and June 18, 1986. At the time these tapes were made, it was clear that defendant Ryans had retained counsel regarding the investigation for which the recordings were made.

The defendant has also suggested that inquiry into grand jury proceedings is necessary to determine the extent such recordings were used by the grand jury in the return of the instant Indictment. While it is difficult to evaluate the impact of these recordings on the grand jury proceedings based upon the present record, the Court finds under the instant circumstances that dismissal of the Indictment itself based upon a violation of DR 7-104 (A)(1) is not warranted.

Accordingly, the Court finds that the defendant's Motion to Suppress is DENIED as to the recorded conversa-

tion of May 5, 1986, and is GRANTED as to the recorded conversations of June 5, 1986, and June 18, 1986.

ENTERED this 23d day of March, 1989.

/s/ Lee R. West
LEE R. WEST
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-6096

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DONALD EUGENE RYANS, doing business as Westside Movers, doing business as Ryans Moving & Storage,
Defendant-Appellee.

ORDER

Filed August 1, 1990

Before HOLLOWAY, Chief Judge, LOGAN and ANDERSON, Circuit Judges.

On consideration [sic] of the pending motion of the defendant-appellee for a stay of mandate pending certiorari, the motion is granted. The court finds a showing has been made that the motion for a stay and a petition for certiorari would not be frivolous or merely for delay.

The mandate of this court shall be stayed for 30 days from the date of this order. If during that time notice is received by the Clerk of this court of the timely filing of a petition for certiorari in the Supreme Court of the United States, the stay shall continue until final disposition of the proceedings in the Supreme Court and our further order in accordance therewith.

Entered for the Court

/s/ Robert L. Holcker
ROBERT L. HOLCKER
Clerk